

TRANSPORTATION REPORT

From: Terry Whiteside

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OXBOW SUES UNION PACIFIC AND BNSF FOR MONOPOLIZATION AND PRICE-FIXING

Lawsuit Seeks To Stop Railroads' Abusive Practices And Save Customers Billions of Dollars according to Oxbow

Oxbow Carbon & Minerals LLC, Oxbow Mining, LLC, Oxbow Calcining International LLC, Oxbow Midwest Calcining LLC, Oxbow Calcining LLC and Terror Creek LLC (collectively "Oxbow") on June 7, 2011 sued Union Pacific Railroad Company (Union Pacific) and Burlington Northern Santa Fe Railway Company (BNSF), accusing the railroads of monopolizing and price-fixing illegally to gouge customers with high rates. Oxbow asked the federal court to order the companies to stop their illegal practices that restrain competition.

"This lawsuit will finally force Union Pacific and BNSF to account, in federal court, for their long history of breaking American antitrust laws. The complaint filed today describes how the railroads have used monopolization and price-fixing illegally to drive up the price of shipping coal and many other products, and those higher prices affect every business and consumer in the country," said Barry Brett of Troutman Sanders LLP, co-counsel for the Oxbow companies in the lawsuit. "Only the power of the federal court can compel the freight railroad industry to fundamentally reform its business practices and stop abusing customers, consumers and the national economy."

In the complaint, filed in U.S. District Court in the District of Columbia, Oxbow alleges that Union Pacific and BNSF have conspired for years to avoid competition at a high cost to customers. Today's action, which cites violations of the Sherman Act by Union Pacific and BNSF, also describes a well-documented pattern to suppress competition for rail freight services. "Union Pacific and BNSF have systematically gouged their customers, and the result is higher prices for everybody — from companies that rely on them to ship their goods to the consumers who buy products shipped on those lines," said Bill Koch, chairman of the board and CEO of Oxbow. The suit also says Union Pacific and BNSF have colluded with the nation's two other major railroads, CSX Transportation Inc. (CSX) and Norfolk Southern Railway Company (Norfolk Southern). The lawsuit alleges that the four major rail shippers have conspired since 2003 to use the deceptive concept of a "fuel surcharge" to raise prices charged to their customers. The so-called "fuel surcharge" has little to do with the actual cost of fuel and is simply a mechanism to increase rail shipping prices.

As further outlined in the complaint, consolidation in the rail industry since the passage of the Staggers Act of 1980 has left only four major rail shippers — Union Pacific, BNSF, CSX and Norfolk Southern. Union Pacific and BNSF control shipping in the western states and agreed not to compete with each other or encroach on each other's service territories by offering lower prices to potential customers.

"With energy and food costs more important issues for this country than ever, the overreaching and abusive behavior long practiced by Union Pacific and BNSF has only shortchanged the American consumer. These companies have a long history of using aggressive tactics to prevent competition and intimidate customers. We stand with our fellow American farmers, miners and shippers in fighting the railroads' efforts to deny us competitive prices and services," said Koch.

Editors Note: Look for this case to be a major landmark case and one that has a long history of preparation by Oxbow and Koch Industries and its legal team. This is a high-powered law firm representing a large passionate client. David Boies is one of the best in the business. David Boies, of Boies, Schiller & Flexner LLP, is one of the premier litigators in the United States and will also lead the legal team confronting the railroad industry over its illegal behavior.

Last November, Boies — who currently represents the NFL in litigation filed by the NFL Players Association — won a \$1.3 billion copyright infringement verdict for Oracle. He also represented the United States in its antitrust trial against Microsoft. Brett has chaired several committees of the American Bar Association's Antitrust Section and began his career with one of the largest private cases against a monopolist in history — 1979's landmark Berkey Photo, Inc. v. Eastman Kodak, Co. Given the movement of the Anti-trust bill in Congress S. 49 - a bill to lift railroad immunity from anti-trust, this case will involve a lot of passion on both sides and supply endless legal maneuvering by the railroads.